STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

Supreme Court No.: 154494

-vs-

GARY MICHAEL TRAVER,
Defendant-Appellee,

_____/

Court of Appeals No.: 325883

Mackinac Circuit No.: 2012-003474-FH
Hon. William Carmody

_____/

DEFENDANT-APPELLEE'S REPLY TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

CERTIFICATE OF SERVICE

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION, JUDGMENT APPEALED FROM AND RELIF SOUGHT

The Defendant-Appellee concedes that this Honorable Court has jurisdiction to hear this application for leave to appeal pursuant to MCL 600.232, and MCR 7.303(B)(1).

The Court of Appeals in a published opinion, *People v Traver*, __ Mich App __; __NW2d __ (2016) (Docket No. 325883), attached to Plaintiff-Appellant's Application for Leave to Appeal, reached the legally correct result and did not misstate or misapply Michigan law in doing so. Defendant-Appellee concedes that the Plaintiff-Appellant's Application is timely filed however is requesting that this Honorable Court deny the Plaintiff-Appellant's request for an order reversing the Court of Appeals' decision because no error occurred.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT IT WAS INSTRUCTIONAL ERROR REQUIRING AUTOMATIC REVERSAL WHERE THE TRIAL COURT NEVER INSTRUCTED THE JURY ON THE ELEMENTS OF THE CRIME OF FELONY FIREARM AND WHERE THE WRITTEN INSTRUCTION PROVIDED TO THE JURY WERE INACCURATE?

   Appellant's answer: Yes

   Appellee's answer: No

   Trial Court's answer: The trial court did not answer

   Court of Appeal's answer: No

2. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT MICHIGAN LAW REQUIRES THAT JURY INSTRUCTIONS BE READ ALOUD AND THAT IT IS INSTRUCTIONAL ERROR REQUIRING AUTOMATIC REVERSAL NOT TO DO SO?

   Appellant's answer: Yes

   Appellee's answer: No

   Trial Court's answer: The trial court did not answer

   Court of Appeal's answer: No

3. DID THE COURT OF APPEALS ERR WHEN IT HELD THAT DEFENDANT-APPELLEE, BEFORE BEING RETRIED, WOULD BE ENTITLED TO A GINTHER HEARING ON THE ISSUE OF TRIAL COUNSEL'S FAILURE TO INSTRUCT HIM THAT A COUNT OF FELONY FIREARM WOULD BE ADDED SHOULD HE BE SUCCESSFUL IN WITHDRAWING HIS PLEA?

   Appellant's answer: Yes

   Appellee's answer: No

   Trial Court's answer: The trial court did not answer

   Court of Appeal's answer: No

INTRODUCTION

Contrary to what is stated by the Plaintiff-Appellant, the Court of Appeals did not introduce three errors into Michigan Law. The Court of Appeals merely applied the law as it already exists.

First the Court of Appeals held that the plain meaning of MCR 2.512 (A)(4) and MCL 2.513(N)(1) and (3) mandate spoken instructions and the failure to do so constitutes structural error requiring reversal of Mr. Traver's convictions. The Court of Appeals did not err when it held that failure to verbally communicate a complete set of jury instructions constituted plain error affecting the Defendant-Appellee's substantial right to have a properly instructed jury pass upon the evidence. *People v Liggett,* 278 Mich 706; 148 NW2d 784 (1967). Furthermore, the Court of Appeals did not err when it held that the error seriously affected the integrity of the trial court proceedings as Mr. Traver had a constitutional right to have a jury determine his guilt from its consideration of every essential element of the charged offense. *People v Kowalski,* 489 Mich 488; 803 NW2d 200 (2011).

Second, the Court of Appeals correctly ruled, that the trial court's failure to instruct on the Felony Firearm charge constituted structural errors requiring automatic reversal and that this error was not waived by trial counsel's approval of the erroneous instruction. Furthermore the Court of Appeals did not err when it held that it did not need to resort to an ineffective assistance of counsel analysis because the error was structural in nature requiring reversal pursuant to *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000). This ruling does not change Michigan Law. Michigan Law has always held that structural errors require reversal without a defendant having to show prejudice.

Furthermore, what greater prejudice could a defendant show than convictions for two felony offenses one of which carried two years' mandatory state prison as a sanction?

Lastly, the Court of Appeals did not err when it held that Mr. Traver was entitled to a Ginther hearing on trial counsel's failure to inform him that should he withdraw his plea, the People would add a count of felony firearm, which as previously stated carried a mandatory prison sanction upon conviction. The Plaintiff-Appellant's argument that Mr. Traver failed to establish the factual predicate for ineffective assistance of counsel must fail where he was not fully advised of the collateral consequences of his plea withdrawal. The Court of Appeals correctly applied *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

For all of these reasons, the Plaintiff-Appellant's Application for Leave to Appeal must be denied.

COUNTER STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

The Defendant, Gary Traver, was arrested on November 12, 2012 and charged with one count of Carrying a Concealed Weapon, MCL 750.227, one count of Felonious Assault, MCL 750.82 and one count Interfering with Electronic Communication Device, MCL 750.540(5)(a).

A preliminary examination was held on November 28, 2012 before the Hon. Beth Ann Gibson in the 92nd District Court. (11/28/12 Tr.).

The matter was bound over on all counts. (Prelim. Tr.).

Defense filed a Motion to Quash, which was heard and taken under advisement on January 25, 2013. (1/23/13 Tr.). Defense argued that Mr. Traver could not legally be charged with carrying a concealed weapon because he was on his own property when the alleged incident occurred. (Id.) The matter was adjourned.

On February 21, 2013 the trial court conducted a pretrial. (2/21/13 Tr.). The court indicated that it had not reached a final decision in regards to the Motion to Quash. (Id. p. 5-6). The matter was adjourned for further discussion about a resolution. (Id. p. 7).

The matter re-convened on March 8, 2013. (3/8/13 Tr.). The People submitted further argument on the Motion to Quash. (Id. p. 3). The matter was scheduled for trial and a decision by the court. (Id. p. 7-8). The Prosecutor further indicated that if he had charged the case, he would have charged Mr. Traver with one count of Felony Firearm in addition to the other charges. (Id. p. 8).

Another Pretrial was conducted on April 5, 2013. (4/5/13). The trial date was confirmed and no ruling was given as to the Motion to Quash. (Id.).

The matter resumed on July 18, 2013. (7/18/13 Tr.). Mr. Traver entered a plea to one count of brandishing a firearm as well to the charged count of Carrying a Concealed Weapon. (Id.). There were discussions about the effect the plea would have on Mr. Traver's ability to continue as a medical marijuana caregiver. (Id. p. 4). The court recessed to allow counsel to research the topic. (Id. p. 5). After a short recess, the trial court reconvened and Mr. Traver plead guilty as stated above. (Id. 5-6, 8-16). It was placed on the record that the spirit of the plea was to allow for Mr. Traver to continue as a caregiver. (Id. p. 6-7).

The matter was adjourned for sentencing. (Id. p. 16).

On September 19, 2013 the matter resumed. (9/19/13 Tr.). Mr. Traver was represented by new counsel. (Id.). It is unknown from the transcript whether Mr. Traver was present during the hearing. From the transcript of the proceeding, it does not appear so. New counsel had filed a motion to withdraw the Defendant-Appellant's plea arguing that the plea had affected his ability to be a medical marijuana caregiver. (Id. p. 3-9). The court granted the motion and allowed the Defendant-Appellant to withdraw his plea. (Id. p. 9). The People then announced that he was adding a charge of Felony Firearm. (Id. p. 10). Defense counsel simply stated that if he did that the Defendant-Appellant would be entitled to a new preliminary examination. He placed no objection to the adding of a count of felony firearm(Id.). The matter was adjourned. (Id. p. 11).

On September 27, 2013, the People amended their information to include a count four, Felony Firearm, MCL 750.227B-A. Defense counsel made no objections and did not ask to have the matter remanded to district court.

Counsel ordered transcripts of all proceedings previously held. Said transcripts were filed on 10/16/2013. (See ROA).

The matter resumed on December 19, 2013. (12/19/13 Tr.). At this hearing it was made clear that the defense had filed no motions and anticipated filing none. (Id. p. 3). The matter was adjourned for trial.

On April 14, 2014 the matter was scheduled for jury trial. (4/14/14 Tr.). The trial court swore a jury panel in. (Id. p. 3). The trial court excused Mr. Traver and his counsel from the court room and then informed the panel that they were excused as the case could not proceed to trial. (Id. p. 4). The trial court then heard and granted a motion to withdraw as defense counsel. (Id. p. 8). Following the withdrawal of counsel, the trial court revoked the Defendant's bond for no reason stated other than the Defendant had previously withdrawn his plea. (Id. p. 8-10). The trial court set new bond in the amount of $50,000 cash. (Id. p. 9). The Defendant-Appellant was then remanded to the custody of the sheriff. (Id. p. 11).

On April 22, 2014 the trial court conducted a bond hearing. (4/22/14 Tr.). New counsel had been retained by Mr. Traver. (Id.). New counsel requested that the court accept property in lieu of cash for bond. (Id. p. 4). The Prosecutor requested that the Defendant-Appellant be required to check in with his attorney weekly. (Id.). The trial court granted the bond motion. (Id. p. 8). The matter was concluded. (Id.).

On May 9, 2014 a pretrial was held. (5/9/14 Tr.). Three offers had been put forth by the People, all of which were turned down. (Id. p. 3). The matter was adjourned to schedule a trial date. (Id. p. 6).

A jury trial was started on August 11, 2014. (8/11/14 Tr.). A jury was seated and testimony was taken. During a recess held during the testimony of the second witness, a juror told the bailiff that they could not be impartial and the trial court declared a mistrial. (Id. p. 90).

Trial commenced on November 12, 2014. (11/12/14 Tr.). Jury selection was held and jurors were seated. (Id. p. 5-32). No apparent issues were presented during selection. (Id.). The court then proceeded to swear the jury in and give the jury all required preliminary instructions. (Id. p. 33-44). The People proceeded to present their opening statement. (Id. p. 44-47). Defendant reserved his opening. (Id. p. 47).

The first witness called by the People was Patrick Richard St. Andre. (Id. p. 48). He testified that he owns land in Mackinac County and that he knows the Defendant-Appellant. (Id. p. 48-49). He proceeded to identify Mr. Traver. (Id.). Mr. St. Andre further testified that he had been neighbors with the Defendant for ten years and that on November 11, 2012 they had a verbal argument about property lines and where Mr. Traver was parking his vehicle. (Id. p. 49-51). He testified that after Mr. Traver threatened him he called 911. When the trooper came out he informed the parties to go to civil court. (Id. p. 52-53). A couple of days prior Mr. St. Andre had left a note for the Defendant instructing him that he could either buy the property from him, rent it from him or stop driving on it. (Id. p. 56). The note was introduced into evidence. (Id.).

Mr. St. Andre further testified that the following day on November 12, 2012, there was another argument where the two parties exchanged words again. (Id. p. 54). During the argument the Defendant stuck his arm out the window waiving a gun. (Id.). Mr. St. Andre testified that he ran out of there to his cabin but that while talking to 911 dispatch

the Defendant came up on him, grabbed him by the shoulders, pushed him to the ground several times all the whilst waiving the gun . (Id. p. 57-59). Mr. St. Andre further testified that his friend was present inside his cabin while the incident took place. He further testified that the Defendant knocked the phone out of his hand as he was talking to dispatch. (Id. p. 59). (Id. p. 60). Mr. St. Andre believed he was going to be shot that day. (Id. p. 61). The 911 recording was introduced as exhibit 2. (Id. p 62).

On cross examination, Mr. St. Andre acknowledged that he had sometimes blocked Mr. Traver from coming and going to and from his property. (Id. p. 65-66). Mr. St. Andre denied blocking Mr. Traver in on the 12th of November, 2012. (Id. p. 73). He did acknowledge returning to Mr. Traver's cabin to park his car. (Id. p. 75). The altercation all happened very quickly. (Id. p. 83).

The second witness called by the People was James Carrico. (Id. p. 86). He testified that he had been friends with Mr. St. Andre for over 30 years and knew Mr. Traver by sight. (Id.). He testified that he was in Mackinac County on November 12, 2012. (Id.). He woke up to Mr. St. Andre and Mr. Traver arguing. (Id. p. 88). He saw Mr. Traver waiving a gun and holding Mr. St. Andre. (Id. p. 89). He testified that Mr. St. Andre got flung to the ground several times. (Id. p. 90). He believed either him or Mr. St. Andre were going to get shot. (Id. p. 91). On cross examination Mr. Carrico testified that he did not know what happened from the start. (Id. p. 93).

The next witness called was Steven Collingwood. (Id. p. 95). He testified that he knew Mr. Traver from performing jobs for him. (Id. p. 97). He testified that he was in Mackinac County on Mr. Traver's property on November 12, 2012. (Id.). He testified that he never heard Mr. Traver yell that he had a gun and never saw him with one either. (Id.

p. 99). He also never saw Mr. Traver assault Mr. St. Andre. (Id. p. 100). He did testify that he saw Mr. St. Andre raise his arms towards Mr. Traver. (Id. p. 103).

The next witness called by the People was Mr. Bommarito from the Mackinac County Sheriff's Office. (Id. p. 106-107). He testified that he is the deputy who went out on a call by Mr. St. Andre on November 11, 2012. (Id.). He spoke to the parties, Mr. St. Andre and Mr. Traver and felt he settled the issue but do tell them to call again if there were other issues. (Id.). The Deputy did not recall if he spoke to Mr. Traver about the use of a firearm on that date. (Id. p. 108). The deputy had no involvement with the parties on the 12th. (Id. p. 109). On cross examination the deputy testified that he did inform both parties that the matter was a civil dispute that needed to be resolved in court. (Id. p. 110). He also advised the parties not to have contact with each other anymore. (Id.).

The next witness called was Deputy Derrell Sadler from the Mackinac County Sheriff's Office. (Id. p. 111). He testified that on November 12, 2012 he had contact with both Mr. St. Andre and Gary Traver. (Id. p. 112). He testified that Mr. Traver admitted to him that he had pointed the gun from inside the house, but denied taking the gun outside or pointing it at anyone. (Id. p. 113).

The next witness called was Deputy Wilk of the Mackinac County Sheriff's Office. (Id. p. 114). He also was dispatched to the dispute between Mr. St. Andre and Mr. Traver on November 12, 2012. (Id. p. 115). He said when he approached the Defendant-Appellant he saw a gun visible in the Defendant-Appellant's waistband. (Id. p. 118). The Deputy then identified the gun, which was then admitted into evidence. (Id. p. 119). There was unspent ammunition in the gun, which was also admitted into evidence. (Id. p. 120). He found no other weapons. (Id. p. 121).

The next witness called was Sergeant Lauren Hartwig from the Michigan State Police. (Id. p. 130). The Sergeant testified that he had contact with Mr. Traver on November 12, 2012. (Id. p. 131). He made no observations of Mr. Traver with a firearm. (Id. p. 132).

The next witness called was Trooper Fred Strich from the Michigan State police. (Id. p. 133). He testified that he came into contact with both Mr. Traver and Mr. St. Andre on November 12, 2012. (Id. p. 134). He was the first person to make contact with Mr. Traver who was leaning up against a car. (Id. p. 138). He ordered Mr. Traver to put his hands in the air and when he did the gun was sticking out. (Id.). He removed the gun from Mr. Traver. (Id. p. 139). He further testified that Mr. Traver indicated to him that he had a permit for the gun, but was never able to produce one. (Id. p. 139-140). He further testified that there was a lot of discussion about property lines and where Mr. Traver thought they were. (Id. p. 141). He opined that Mr. Traver was on Mr. St. Andre's property line when he came upon him. (Id. p. 143). Mr. Traver acknowledged to him that he did show Mr. St. Andre the gun through the window of his cabin, but denied ever waiving it at him. (Id. p. 144). Mr. Traver further told the Trooper that he believed he was carrying on his own property, which is allowed by law. (Id. p. 145). On cross examination the Trooper acknowledged that this belief would have been correct. (Id. p. 147). He also acknowledged that he saw no injury to Mr. St. Andre. (Id. p. 148).

The People rested. (Id. p. 152). The Defense waived their opening and called Mr. Traver to testify. (Id. p. 153). No Motion for a Directed Verdict was made. (Id.).

Mr. Traver testified that he was on his property on November 12, 2012. (Id.). He arrived on the 11th. (Id. p. 154). He testified that when he got to his property he found the

note introduced as Exhibit 1 on his door. (Id.). Later that day Mr. St. Andre called the police who came to the property. (Id. p. 155). He further testified that there had been a property line dispute for only about 1 year and that there was no dispute the first 8-9 years that Mr. St. Andre had owned his house. (Id. p. 156). He further testified that the dispute was over a common driveway that Mr. St. Andre had blocked three times. (Id.). On the November 11, 2012 date when Trooper Bommarito came out Mr. Traver did not believe he had exchanged any words with Mr. St. Andre. He believed the Trooper was called because he had parked his car in a place that Mr. St. Andre didn't like. (Id. p. 157). He further testified that the trooper told Mr. St. Andre that it was a civil dispute that he couldn't resolve. (Id.).

Mr. Traver further testified that on November 12, 2012 he was woken up around 7 am by yelling of obscenities and knocking on his window. (Id.). The individual yelling was Mr. St. Andre. (Id. p. 158). He said Mr. St. Andre was close enough to his trailer that he could have touched him through the window. (Id.). Mr. Traver testified that he pulled out his pistol, opened his window and told Mr. St. Andre to get away from his window. (Id. p. 158-159). He denied pointing the gun. (Id. p. 159). He said he then went out the cabin and saw Mr. St. Andre walking towards his with his arms raised. (Id. p. 160). He denied having his gun on him at that time. (Id. p. 161). He also testified it was dark outside. (Id.). Mr. Traver testified that the whole outside encounter lasted about 20 seconds and that he then retrieved to his cabin. (Id. p. 162). After returning to the trailer he saw that Mr. St. Andre had him blocked in on his property with his vehicle. (Id.).He called a towing company to have Mr. St. Andre's car towed because it was preventing him from leaving his property. (Id. p. 163). While waiting for the tow truck he went and got the gun from

the inside, fearing problems when it showed up. (Id.). He was certain that he was on his property at that time. (Id.). He denied pointing the gun at anyone. (Id. p. 165). He denied ever threatening anyone with a gun. (Id. p. 166). On cross examination Mr. Traver testified that he had hired two different attorneys to attempt to resolve the civil property matter but to date no lawsuits had been filed. (Id. p. 168). He further testified that the towing company did show up but it was after he was already detained in a patrol vehicle. (Id. p. 171).

Defense rested. (Id.). The parties proceeded to closing argument. (Id. p. 173-187). The trial court proceeded to instruct the jury. (Id. p. 187-197). Among the instructions the trial court indicated to the jury that they could only find the Defendant guilty of Felony Firearm if they found him guilty of one or more of the underlying felonies. The court stated: "[I]f you do find the defendant guilty in count one, two or three, and understand, in your belief, that a weapon was used to commission those crimes, then count four would be applicable". No objection was placed to this instruction. (Id. p. 199). The jury instructions did not state that there could be a finding of guilt of all, some or none of the crimes charged.

The jury deliberated and returned a unanimous verdict of guilty on count two Felonious Assault and count four Felony Firearm. (Id. p. 200). The jury was polled and the verdict was unanimous. (Id. p. 201). The matter was scheduled for sentencing and the Mr. Traver was remanded to the custody of the Sheriff's Department. (Id. p. 203).

Sentencing was held on December 18, 2014. (12/18/14 Tr.). Defense put forth no objections to the scoring of the guidelines. (Id. p. 3). Mr. Traver maintained his innocence despite the jury verdict. (Id. p. 5). The trial court sentenced the Mr. Traver to

two years in the Michigan Department of Corrections on the felony firearm and credit for time served on all the other counts. (Id. p. 23).

The Defendant-Appellee filed a timely Brief on Appeal. On August 2, 2016 the Court of Appeals in a published opinion reversed Mr. Traver's convictions. In reversing the convictions the Court of Appeals held in pertinent part that two structural errors, requiring automatic reversal had occurred. The first one when the trial court failed to orally instruct the jury on the elements of the crimes charged and the second one when the trial court failed entirely, to instruct the jury on the correct elements of the crime of felony firearm. Lastly, the court of appeals held that Mr. Traver was entitled, prior to exercise his right to a new trial, to a Ginther hearing on the issue of trial counsel's ineffective assistance of counsel in failing to inform him of the People's intent to add a count of felony firearm should he successfully withdraw his plea. See *People v Traver*, ___ Mich App ___; ___ NW2d ___ (2016), COA No. 325883).

The Plaintiff-Appellee is now asking this Honorable Court to grant leave to appeal arguing that the Court of Appeals erred where it did not. Likewise the Court of Appeals did not change Michigan Law as it currently stands. It merely applied already existing law to Mr. Traver's case. Therefore this Honorable Court should deny the Plaintiff-Appellant's Application for Leave to Appeal.

ARGUMENT I

THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THAT IT WAS A STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL WHERE THE TRIAL COURT NEVER INSTRUCTED THE JURY ON THE ELEMENTS OF THE CRIME OF FELONY FIREARM AND WHERE THE WRITTEN INSTRUCTION PROVIDED TO THE JURY WERE INACCURATE. THE STRUCTURAL ERROR TRUMPED DEFENSE COUNSEL'S AGREEMENT TO THE ERRONEOUS INSTRUCTION.

STANDARD OF REVIEW

Questions of Instructional Error are reviewed De Novo. *People v Kowalski, supra*.

An error in the instruction of the elements of a crime is an error of constitutional magnitude. *People v Carines*, 460 Mich 750, 766; 597 NW2d 130 1999). Constitutional errors must be classified as either structural or nonstructural. *People v Duncan, supra*. "If the error is structural, reversal is automatic." *Id*. The reversal is automatic and not subject to the waiver discussed by the Plaintiff-Appellant in their application for leave to appeal. *Kowalski, supra* and *Duncan, supra.* Furthermore, the Plaintiff-Appellant erroneously state that the Court of Appeals used a "plain error framework" in analyzing the case at bar. It did no such thing. Instead the Court of Appeals correctly held that the trial court's failure constituted a structural error requiring automatic reversal of Mr. Traver's convictions.

DISCUSSION

From the available record, including the instruction that contained a jury question and which was made part of the record, it is clear that the jury was never instructed on the elements of a felony firearm as required by the model jury instruction CJI2d 11.34. The

trial court also never instructed the jury that they could find Mr. Traver guilty of all some or none of the offenses charged as required by CJI2d 3.20.

Furthermore, the judge in instructing the jury, stated that should they find the defendant guilty on count one, two and/or three and if they believed that one or more of those offenses were committed with a firearm, then count four would kick in, left the jury with no choice but a guilty finding on count four felony firearm, once they found him guilty of the felonious assault. A verbal instruction of CJI2d 11.34 was not given to the jury by the trial court at any point during trial. The written instruction that may or may not have been provided to the jury (there is no copy of the jury instructions contained in the court file). The trial court erred when it failed to instruct the jury on all the elements of all the crimes. Specifically, the trial court omitted reading the elements of the count of felonious assault and the count of felony firearm; coincidently the two counts the Defendant-Appellee was found guilty of. This deprived the jury of an understanding of what the Prosecutor had to prove beyond a reasonable doubt before finding him guilty. As correctly stated by the Court of Appeals' majority opinion; the trial court failed to instruct orally on the two elements of the felony firearm charge. Defense counsel did not request instruction on the felony firearms elements either. By failing to provide the jury with the model instruction, the trial court violated MCR 2.512 (D)(2). Furthermore, the Court of Appeals correctly held that the trial court provided inaccurate written instructions regarding the elements of felony firearm. These compiled errors constituted structural error requiring reversal despite the waiver by trial counsel. This ruling is consistent with this Honorable Court's ruling issued in *People v Duncan, supra.* In that case trial counsel also failed to object to the instruction. This Court held that the trial court's failure to

properly instruct on any of the elements of the charge of felony firearm, sent the jury to deliberate without the law that was to be applied to the facts. *Id.* Juries cannot be allowed to speculate. The trial court must inform the jury of the law by which its verdict must be controlled. *People v Lambert*, 395 Mich 296; 235 NW2d 338 (1975). Like in *Duncan, supra*, the trial court in Mr. Traver's case failed to do so, thereby requiring automatic reversal of the Defendant's convictions.

A waiver does not extinguish a structural error. An error in the instruction of the elements of a crime is an error of constitutional magnitude. *People v Carines, supra*. Constitutional errors must be classified as either structural or nonstructural. *People v Duncan, supra*. "If the error is structural, reversal is automatic." *Id*. The reversal is automatic and not subject to the waiver discussed by the Plaintiff-Appellant in their application for leave to appeal. *Kowalski, supra* and *Duncan, supra.* Furthermore, the Plaintiff-Appellant erroneously state that the Court of Appeals used a "plain error framework" in analyzing the case at bar. It did no such thing. Instead the Court of Appeals correctly held that the trial court's failure constituted a structural error requiring automatic reversal of Mr. Traver's convictions despite the waiver; consistent with current Michigan Law.

ARGUMENT II

THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THAT MICHIGAN LAW REQUIRES THAT JURY INSTRUCTIONS BE READ ALOUD AND THAT IT IS STRUCTURAL ERROR REQUIRING AUTOMATIC REVERSAL NOT TO DO SO WHEN COMBINED WITH ERRONEOUS WRITTEN INSTRUCTIONS WHICH MAY OR MAY NOT HAVE BEEN PROVIDED TO THE JURY.

STANDARD OF REVIEW

Questions of Instructional Error are reviewed De Novo. *People v Kowalski, supra*.

An error in the instruction of the elements of a crime is an error of constitutional magnitude. *People v Carines, supra*. Constitutional errors must be classified as either structural or nonstructural. *People v Duncan, supra*. "If the error is structural, reversal is automatic." *Id*. Furthermore, the Plaintiff-Appellant erroneously state that the Court of Appeals used a "plain error framework" in analyzing the case at bar. It did no such thing. Instead the Court of Appeals correctly held that the trial court's failure constituted a structural error requiring automatic reversal of Mr. Traver's convictions.

DISCUSSION

An error in the instruction of the elements of a crime is an error of constitutional magnitude. *People v Carines, supra*. Constitutional errors must be classified as either structural or nonstructural. *People v Duncan, supra*. "If the error is structural, reversal is automatic." *Id*.

In the case at bar, prior to the commencement of testimony, the trial court instructed the jury as follows:

"[T]o prove the charges, the prosecutor must prove beyond a reasonable doubt the following information that you have in your hand. I'd ask you take a look now at what has been passed out to you.

In count one, the defendant is charged with the crime of carrying a concealed weapon. To prove this charge, the prosecutor must prove, beyond a reasonable doubt, those elements so listed. First, knowingly carried a weapon, a pistol. It does not matter whether the defendant was carrying the weapon, but to be guilty of the crime, the defendant must have known, that it was a weapon. Second, that this pistol was concealed, complete invisibility is not required. A weapon is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant.

Now, as you can see in count two and count three, and count four, those are the elements, ladies and gentlemen, that you will need to pay attention to during the course of this trial. Those are the four counts that Mr. Traver is charged with, and the attorneys will be discussing all of those as we proceed through here by questions of the witnesses. Okay?". (See 11/12/14 Tr. p. 34-35). It is unknown what was given to the jury as this is not part of the record. The trial court never went through all the elements which needed to be proven beyond a reasonable doubt by the People on the charges that Mr. Traver was eventually found guilty of; i.e. the count of felonious assault and the count of felony firearm.

At the conclusion of testimony the trial court stated as follows:

"[O]ne of the exhibits has been a pistol. A pistol is a firearm and a firearm includes any weapon from which a dangerous object can be shot or propelled by the use of explosive gas or air. The shape of a pistol is not important as long as it 30 inches or less in length. Also, it does not matter whether or not the pistol was loaded.

The intent with which an assault is made can be sometimes determined by whether a dangerous weapon was used. Again, a dangerous weapon is any instrument that is used in a way likely to cause serious physical injury or death. A gun or a revolver, in this instance a pistol, is a firearm, and as such, can be considered a dangerous weapon.

Gentlemen, those are the final instructions. Any issue with the instructions? Mr. Hickman?". (11/19/14 tr. p. 196).

The following exchange then took place:

Mr. Hickman: "[I] guess yeah. Your Honor, I have a -- problem with count four. I don't think it makes it clear that there has to be an underlying felony before count four--they could find anybody guilty of count four."

Mr. Spencer: "[Y]our Honor, I think that's absolutely correct and I know I attempted to explain that to the jury, but, you know, I think Mr. Hickman's quite accurate that you can't have felony firearm, if there is not a conviction for a felony".

The Court: "[C]orrect. The point that Mr. Hickman is making, ladies and gentlemen, is referenced in count four, felony firearm, possession. If, for example, you

find the defendant not guilty of the other three counts, you cannot find him guilty of the felony firearm. Okay? Because no felony has been committed. Mr. --"

Mr. Spencer: "[B]ut, your Honor, I – I do want it clear, and I think Mr. Hickman would agree, that if you're found guilty of one or two or three of the other charges, and you find it was committed with a firearm, or you were in possession of a firearm, that's when the felony firearm kicks in."

Mr. Hickman: "[A]bsolutely."

The Court: "[A]bsolutely, correct. Absolutely, correct. If you do find the defendant guilty in count one, two or three and understand, in your belief, that a weapon was used to commission those crimes, then count four would be applicable. Satisfied, gentlemen?"

Mr. Hickman: "[Y]es, your Honor.

Mr. Spencer: [I] am satisfied your Honor."

(See 11/19/14 Tr. p. 196-198).

The jury was never instructed that it could find the Defendant-Appellant guilty of all some or none of the offenses charged. Furthermore it does not appear from the file or the transcripts that CJI2d 3.20 or CJI2d 11.34 were included in the instructions given to the jury. (See 11/19/14 Tr. p. 187-196). CJI2d 3.20 reads in pertinent part:

"(1) The defendant is charged with _____ counts, that is, with the crimes of _____ and _____. These are separate crimes, and the prosecutor is charging

that the defendant committed both of them. You must consider each crime separately in light of all the evidence in the case.

(2) You may find the defendant guilty of all or [any one / any combination] of these crimes [, guilty of a less serious crime,] or not guilty".

CJI2d 11.34 reads in pertinent part:

(1) The defendant is also charged with the separate crime of possessing a firearm at the time [he / she] committed [or attempted to commit][FN 1] the crime of _____.

(2) To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(3) First, that the defendant committed [or attempted to commit] the crime of _____, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime.

(4) Second, that at the time the defendant committed [or attempted to commit] that crime [he / she] knowingly carried or possessed a firearm.

A verbal instruction of CJI2d 11.34 was not given to the jury by the trial court at any point during trial. The written instruction that may or may not have been provided to the jury was defective as stated by the Court of Appeals (there is no copy of the jury instructions contained in the court file). There is no record of what, if anything was given to the jury in writing, because a complete set of instructions were not filed with the court. The trial court erred when it failed to instruct the jury on all the elements of all the crimes. Specifically, the trial court omitted reading the elements of the count of felonious assault and the count of felony firearm; coincidently the two counts the Defendant-Appellant was found guilty of. This deprived the jury of an understanding of what the Prosecutor had to

prove beyond a reasonable doubt before finding him guilty. As correctly stated by the Court of Appeals' majority opinion; the trial court failed to instruct orally on the two elements of the felony firearm charge. By failing to provide the jury with the model instruction, the trial court violated MCR 2.512 (D)(2). Furthermore, the Court of Appeals correctly held that the trial court provided inaccurate written instructions regarding the elements of felony firearm. These compiled errors constituted structural error requiring reversal despite the waiver by trial counsel. This ruling is consistent with this Honorable Court's ruling issued in *People v Duncan, supra.* In that case trial counsel also failed to object to the instruction. This Court held that the trial court's failure to properly instruct on any of the elements of the charge of felony firearm, sent the jury to deliberate without the law that was to be applied to the facts. *Id.* Juries cannot be allowed to speculate. The trial court must inform the jury of the law by which its verdict must be controlled. *People v Lambert, supra*. The trial court failed to do so, leaving the jury to guess which law to apply in deciding the case.

The Court of Appeals in analyzing the need for jury instructions to be read to the jury, applied the plain language of MCL 2.512(D)(2) and MCR 2.513(N) require the instructions be read aloud. In reaching that conclusion the Court of Appeals applied the plain meaning of the statute as it is required to by *People v Buie,* 285 Mich App 401; 775 NW2d 817 (2009). The Court of Appeals went through an extensive analysis of both state and federal case law requiring instructions be read aloud (See *People v Traver,* ___ Mich App ___; ___ NW2d ___ (2016). No error occurred when the Court concluded that Michigan Law require instructions be read aloud. The Plaintiff-Appellant may disagree,

but the Court of Appeals reached the legally correct result and did not misstate or misapply Michigan law in doing so.

An error in the instruction on the elements of a crime is an error of constitutional magnitude. *People v Carines*, *supra*. The instructions as given in Mr. Traver's case did not sufficiently protect Mr. Traver's rights. As a matter of fact none of his rights were protected where the instructions failed to inform the jury of the elements of the crime both orally and in writing and where the Court failed to tell the jury that it could find Mr. Traver guilty of all, some or none of the crimes. This left the jury with no choice but a guilty finding on the one count of felony firearm. The instruction was erroneous because it excluded the possible verdicts of not guilty on the felony firearm where a guilty verdict had been rendered on one or more of the other counts. *People v Ward*, 381 Mich 624; 166 NW2d 451 (1969). It was also erroneous where it did not state the two elements of the felony firearm charge. A manifest injustice occurs when a missing or erroneous instruction pertains to a basic and controlling issue in the case. *People v William Johnson*, 187 Mich App 621; 468 NW2d 307 (1991). This is exactly what occurred in Mr. Traver's case and it left Mr. Traver insufficiently protected as the jury was left guessing as to how to apply the facts of the case to the correct set of legal rules. The trial court's lack of instructions constituted constitutional violation and reversal is required as this instruction took an element of the offense away from the jury. *People v Tice,* 220 Mich App 47; 558 NW2d 245 (1996); *Duncan, supra, Kowalski, supra* and US Const Am V and VI, Mich Const.

This error required reversal of Mr. Traver's conviction because it was structural in nature.

In conclusion, it is striking that the jury found Mr. Traver guilty of the two offenses that the trial court failed to instruct them on. The Court of Appeals correctly stated that a failure to orally instruct the jury, combined with the other errors that occurred in this case amounted to structural error requiring automatic reversal pursuant to *Duncan, supra.*

ARGUMENT III

THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THAT DEFENDANT-APPELLEE, BEFORE BEING RETRIED, WOULD BE ENTITLED TO A GINTHER HEARING ON THE ISSUE OF TRIAL COUNSEL'S FAILURE TO INSTRUCT HIM THAT A COUNT OF FELONY FIREARM WOULD BE ADDED SHOULD HE BE SUCCESSFUL IN WITHDRAWING HIS PLEA.

STANDARD OF REVIEW

Questions of Ineffective Assistance of Counsel are governed by a mixed standard of review. Where the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613 (C); *People v LeBlanc*, 465 Mich 575; 640 NW2d 246 (2002). Also, whether the facts establish ineffective assistance of counsel involves a question of constitutional law, which is reviewed de novo. *Id*. The Court's review is limited to errors apparent from the record. *People v Heft*, 299 Mich App 69; 829 NW2d 266 (2012).

DISCUSSION

The Sixth Amendment guarantee to the right to the assistance of counsel during their criminal proceedings extends to the plea-bargaining process, during which defendants are entitled to the effective assistance of competent counsel. The right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. Defense counsel has a duty to communicate plea offers to the defendant and give competent advice in regard to accepting or rejecting the offer. *Lafler v Cooper*, 132 S Ct 1376, 1384 (2012); *Missouri v Frye*, 132 S. Ct. 1399 (2012). The Court of Appeals in Mr.

Traver's case, correctly held that the same applies when counsel is advising a client on how to proceed with a plea withdrawal.

Mr. Traver successfully argued in the Court of Appeals that he should be afforded an opportunity to show that his trial counsel was ineffective in advising him prior to him withdrawing his guilty plea. The record is abundantly clear that the People were going to add a count of felony firearm should Mr. Traver withdraw his plea. For the People to argue in their application for leave to this Court that trial counsel could not be ineffective for failing to advise Mr. Traver of something that had yet to occur is disingenuous. *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010) specifically states that effective assistance of counsel includes the attorney informing his or her client of any *potential* immigration consequences. Failure to do so entitles a defendant to withdraw their plea. Likewise, counsel, prior to Mr. Traver withdrawing his plea should have informed him of the *potential* consequences of that withdrawal. They failed to do so. Moreover, the People's intent was clear, making the adding of a count of felony firearm close to a certainty; which materialized following the plea withdrawal. Much like a deportation may materialize following the entry of a plea on a criminal charge. What was also clear from the record is that Mr. Traver was never advised of this consequence. His trial counsel was ineffective for filing a motion to withdraw plea without appraising Mr. Traver that a count of felony firearm, which carried a 2 year mandatory prison sentence upon conviction, would be added to the information if he withdrew his plea.

Furthermore, the record is also deprived of any indication that Mr. Traver was present during the hearing where the People made its intent known. Because Mr. Traver lived a ways away from the court he had been allowed on numerous occasions not to

appear. The record always reflected his presence. It did not during said pretrial. It should also be noted that Mr. Traver changed attorneys between proceedings and there is no record evidence that the exiting attorney informed the entering attorney of the People's intent. Likewise Mr. Traver showed prejudice. He received a two year prison sentence as a result of trial counsel ineffective representation. But for the trial counsel's errors and ineffectiveness the Defendant-Appellant would not have been found guilty of the crimes charged, making it clear that a miscarriage of justice has occurred.

Mr. Traver absolutely showed trial counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688, 521 NW2d 557 (1994). Mr. Traver also successfully demonstrated both prongs of *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80L Ed 674 (1984) and the Court of Appeals did not err in their decision and ruling.

RELIEF REQUESTED

Mr. Traver respectfully request that this Honorable Court deny the Plaintiff-Appellant's Application for Leave to Appeal by finding that the Court of Appeals did not commit error when it reversed Mr. Traver's convictions and remanded the case to the trial court, holding among others that prior to re-trial Mr. Traver must be afforded an opportunity to hold a Ginther hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973) and that if successful he must be re-offered his original plea deal.

Respectfully submitted,

/s/Cecilia Quirindongo Baunsoe
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Attorney for Defendant-Appellee

Dated: October 12, 2016

STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

Supreme Court No.: 154494

-vs-

GARY MICHAEL TRAVER,
Defendant-Appellee,

_____/

Court of Appeals No.: 325883

Mackinac Circuit No.: 2012-003474-FH
Hon. William Carmody

_____/

PROOF OF SERVICE:

The undersigned certifies that a copy of the Defendant-Appellee's Reply to Plaintiff-Appellant's Application for Leave to Appeal, and Proof of Service were served upon:

Michigan Attorney General's Office
Criminal Appellate Division
Scott R. Shimkus (P77546)
PO Box 30217

Via E-Filing and E-Service on 10/14/2016

I declare under penalty of perjury that the statement above is true to the best of my knowledge, information and belief.

K AND Q LAW, PC

Dated: October 14, 2016

By: /s/ Cecilia Quirindongo Baunsoe__
Cecilia Quirindongo Baunsoe (P68374)
Attorney for Defendant-Appellee